Supreme Court, U.S.
FILED

981259 FEB 5 1999

OFFICE OF THE CLERK

No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LEON PATILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. KOPENY
WILLIAM J. KOPENY & ASSOCIATES, INC.
8001 IRVINE CENTER DRIVE, SUITE 1170
IRVINE, CALIFORNIA 92618-2933
TELEPHONE: (949) 453-2243
FAX: (949) 453-1516

Counsel of Record for Petitioner
Leon Patillo

2888

QUESTION PRESENTED

1. Should federal bank fraud under Title 18 U.S.C. §1344 be narrowly interpreted to cases in which the intended victim is actually a federal bank, or expansively interpreted to cover many ordinary state law fraud crimes in which, although unintended, a federal bank is negligently placed at a "risk of loss" by the false statements of the defendant to the bank?

TABLE OF CONTENTS

Page

Question Presented vii

Table of Authorities iv

Petition for Writ of Certiorari 1

Opinion Below 1

Jurisdiction 1

Statutes and Constitutional Provisions Involved 1

How the Federal Questions were Raised Below 2

Summary of Argument 6

Reasons for Granting the Writ 8

1. Title 18 U.S.C. §1344 should not be applied expansively to make every ordinary state fraud crime federal bank fraud merely because it involves making a false statement to a bank or because the bank is unintentionally placed at a risk of loss 8

   (a) The plain language of 18 U.S.C. §1344 requires that the government prove a specific intent to defraud the federal bank, not just an intent to defraud someone, with the incidental risk that a federal bank may become civilly liable for some or all of that loss 9

Table of Contents
(continued)

Page

(b) Assuming, without conceding ambiguity in 18 U.S.C. §1344 would permit charging and convicting Petitioner of a scheme to defraud a federal bank where, as here, the government theory and evidence was that his scheme was to defraud Western Alistar, Inc. by depositing a check payable to them into his own account at the bank and then withdraw the funds, the rule of lenity would forbid that interpretation. 13

(c) Even considering legislative history, the interpretation urged by the government below would eliminate an element of the crime legislators intended to include — the intent to defraud a federal financial institution. 16

Conclusion 19

Appendices 1a

TABLE OF AUTHORITIES

Page(s)

CASES:

Albernaz v. *United States*, 450 U.S. 333 (1981) 15

McNally v. *United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) 14, 15, 17, 18

Lewis v. *United States*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971) 15, 18

United States v. *Archer*, 486 F.2d 670, (2d Cir.1973) . . 18

United States v. *Barakett*, 994 F.2d 1107 (5th Cir.), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 701, 126 L.Ed.2d 668 (1994) 11

United States v. *Bass*, 404 U.S. 336 (1971) 15

United States v. *Briggs*, 965 F.2d 10 (5th Cir. 1992) . . 10

United States v. *Gradwell*, 243 U.S. 476 (1917) 15

United States v. *Holly*, 23 F.3d 902 (5th Cir. 1994) . . . 11

United States v. *Mason*, 902 F.2d 1434 (9th Cir. 1990) 12, 13

United States v. *Morgenstern*, 933 F.2d 1108 (2d Cir. 1991) 10, 11

United States v. *Stavroulakis*, 952 F.2d 686 (2d Cir. 1992) 10, 13

United States v. *Wolfswinkel*, 44 F.3d 782 (9th Cir. 1995) 9

United States v. *Young*, 952 F.2d 1252 (10th Cir. 1991) 10, 11

Table of Authorities
(continued)

Page(s)

STATUTES & MISCELLANEOUS:

R.J. Miner, Federal Courts, Federal Crimes, and Federalism, 10 Harv.J.L. & Pub.Pol'y 117, (1987) 18

Title 18 United States Code

Section 1341 . . . . . 17, 18

Section 1344 . . . . . *passim*

Section 1952 18

Title 28 United States Code

Section 1254(1) 1

Supreme Court Rules:

Rule 13.4 2

S. Rep. No. 225, 98th Cong., 2d Sess. (1983) 16, 17

H.R. Rep. No. 901, 98th Cong., 2d Sess (1984) . . 16, 17

PETITION FOR WRIT OF CERTIORARI

Petitioner, LEON PATILLO, respectfully prays that a writ of certiorari issue to review the judgment and memorandum of the United States Court of Appeals, Ninth Circuit, affirming his conviction of federal bank fraud in violation of Title 18 U.S.C. §1344 and sentenced to federal prison for a term of 12 months.

OPINION BELOW

The memorandum of the circuit court is reproduced in the Appendix at pp. App. 1. - App. 2. A facsimile of the order of the circuit court denying rehearing is also appended.[1] (App. 3.)

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the district court was rendered on September 8, 1997. The memorandum of the circuit court was filed on October 8, 1998. A petition for rehearing and suggestion for rehearing *en banc* was timely filed, and the order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on December 18, 1998.

This Petition is timely filed pursuant to Rule 13.4 of the Supreme Court rules.[2]

---

[1] In the proceeding below Leon Patillo, Petitioner herein, appeared as defendant and appellant; the United States of America appeared as plaintiff and appellee.

[2] The circuit court also granted Petitioner's motion to stay the mandate pending the filing of this petition, which, under the rules of the ninth circuit, requires the petitioner to establish probable cause for the issuance of a writ of certiorari by this Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves Section 1344 of Title 18 of the United States Code, and constitutional provisions relating to the interpretation of a criminal statute.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

By Indictment Petitioner was charged on February 25, 1997 in two counts with, violating 18 U.S.C. §1344. It was alleged that he "knowingly executed and attempted to execute a scheme to defraud City National Bank, and to obtain moneys and funds owned by and in the custody and control of that bank." (*Indictment*, ¶ II.A.). The indictment further alleged that the following acts were committed "to execute the above-described fraudulent scheme":

1.	January 31, 1994	Filing of Fictitious Business Name Statement in the name of Western Alistar;
2.	February 11, 1994	Deposit of check in the amount of $78,000. in City National Bank Account # 006-483960.

Each of the above acts was charged as a separate count. No other statute or crime is named or alleged in the indictment other than a scheme to defraud under Section 1344. The trial of the matter commenced on May 13, 1997 and after a 2 day trial he was, on May 14, 1997, found *guilty*. Defendant was sentenced to one year and one day in federal prison and he remains free on bond pending this Court's final determination of his appeal.

Dwight Lancaster Dunlap, the treasurer and secretary of Western Pocahontas Corporation, testified that the shareholders of Western Alistar, Incorporated, one of the companies that invested in Western Pocahontas, are Peter and Allyson Baumann. He has known the Baumann's since 1986. An investor in Western Pocahontas is given periodic monetary distributions at no set scheduled time.

Western Alistar was to receive a distribution of $78,000.00 from Western Pocahontas in January 1994.

Leon Patillo has never been a member of the Board of Directors of Western Pocahontas, an investor or associated with Western Pocahontas Properties in any way.

Peter Baumann testified that he is an investor. The business manager, Jan McKenna, was authorized to deposit checks on behalf of Western Alistar. He does not know Leon Patillo. He was not authorized to deposit any checks issued to Western Alistar. From the years 1988 to 1991 he lived at 680 Siena Way. He moved from that address in 1991.

He did not notify Western Pocahontas that he was no longer living at that address.

Mark Edward Scott testified that he is a property manager for Ted Cooper Properties who in 1994 managed property located at 680 Siena Way in Los Angeles.

From 1991 until the very end of 1993 the property was vacant except for a house sitter, Jackie Sullivan, who lived there very briefly. The defendant then moved in.

He did not know if Patillo lived or worked at that property prior to 1994.

Sophia Edison, an operations manager for Federal Express, testified that the sender of the airway bill was Nick Carter with Western Pocahontas Properties and the intended recipient was Peter Baumann. They keep a record of the actual signature of who signed for the package. The signed by section is signed by "P", last name Patillo.

Carmen Younan, Client Sales Officer, Assistant Vice President of City National Bank, testified that Patillo had a bank account with the bank named Leon Patillo d\b\a LP Productions. It was opened on May 26, 1992. The authorized signatures on that account are Leon Patillo and Howard Spellers. On January 31, 1994 that account was changed and Western Alistar was added. She stated that in order to make a change of name on an account to add a business, a d\b\a certificate must be submitted to the bank. Mr. Patillo submitted one to make the January 31, 1994 change.

On February 11, 1994 a $78,000.00 check [payable to Western Alistar] was deposited into the account. In February, 1994 Mr. Patillo's starting balance was $7,450.55. A deposit in the amount of $78,000.00 appears on the statement, and the ending balance for the month was $44,878.61. By the end of the next month his balance was $1,656.54.

Although the account had Western Alistar added, it retained the name of Leon Patillo.

Joyce Wilson, an employee of City National Bank, testified that she is a fraud investigator and she investigated a claim of loss by Western Alistar, Incorporated, which also had an account at the same bank as Mr. Patillo. She identified a document showing that the Bank reimbursed the Western Alistar, Inc. account for the sums paid into the account of Mr. Patillo, dba Western Alistar.

Besides a Clerk who testified about fictitious business name statements, the only defense witness called was the defendant himself. He testified, in essence, that he had been a successful musician and song writer and that he received money for residuals every three months. He invested $20,000.00 to $40,000.00 per year with an investment counselor named David Dowgileialo. He told him to invest now, and that within 10-12 years they would begin to pay out. In 1992 and 1993 he started to receive disbursements from some of his investments. He explained, generally, that when a check would come in, it might be payable to a business and he would take out a dba in that name and add it to his account, and cash the check. The bank recommended to him how to handle it. In January of 1994 he moved to 680 Siena Way. He received the check in question in a Federal Express package. As it was from a limited partnership, it appeared to be similar to the checks he had received from his investments, which were also from limited partnerships, often from names of companies that were limited partnerships. Sometimes he did not know what the names of the companies were. He took the check to his bank but was told he could not deposit without a dba, so he filed for one and then deposited the check. He believed he had the right to use that name and that the check was from one of his investments. It was never his intent to defraud the bank.

On appeal, the circuit court merely noted that a conviction under Section 1344 can be had on substantial evidence that the defendant intended to defraud a bank and that the statue reaches money under the custody or control of a federal bank. (App. 1-2). The Circuit memorandum side steps this entire issue (although it was clearly presented in the briefs) by (*i*) relying on a theory never relied upon by the

Government in the trial court[3] and (*ii*) by means of a standard not argued by the Government or supported by any authority either cited by the Government in this case or the memorandum of the panel deciding the case.[4]

SUMMARY OF ARGUMENT

Petitioner urges this Court to grant Certiorari and to rule that where a defendant lied to a federal bank in order to further a scheme to defraud a private party the crime is not a federal bank fraud unless he intends to defraud the federal bank of its property. Here the indictment alleged an intent to

---

[3] The Government tried this case on the theory that defendant was guilty of defrauding City National Bank because he intended to obtain funds belonging to a non-bank corporation, which funds were originally on deposit in an out-of-state bank (not named as a victim), and then paid by that bank to the named victim bank to re-imburse it for placing funds into Appellant's (newly opened) account, which Appellant withdrew. He had no intention of obtaining funds either belonging to, or under the custody and control of, the named victim federal bank, but the evidence amply supported the jury's finding that he intended to make a false statement to that bank to obtain funds belonging to a non-bank corporation, which were, at that time, on deposit in another (unnamed) bank. On appeal the panel opinion stated that the evidence was sufficient to convict of obtaining funds "under the custody and control" of the named victim bank, even though that theory was never mentioned by the government at any time in the trial, nor relied upon on appeal by the government.

[4] The memorandum states that the evidence is sufficient to convict of *bank fraud*, without clearly adverting to the issue raised on the appeal, by virtue of the conclusion that the "the trier of fact could reasonably conclude that the defendant Patillo, intended to deceive City National Bank, and *that is sufficient for the purpose of 18 U.S.C. §1344.*" It was never argued by Appellant that his lies to the victim bank were *insignificant*. Rather, it was argued that to convict of bank fraud, more than telling a federal bank a lie with the intent to defraud *someone* is required — there must be an intent to defraud *that bank* of its property — which was absent here.

defraud the federal bank of its property, but the jury was only required to find the defendant misled the bank with an intent to defraud the party that actually owned the property. The government relied on the "risk of loss" doctrine, and the fact the bank was *liable* to repay the victim due to its own negligence.

At trial the government's proof and argument showed only, at most, an intent to defraud Western Alistar, and the negligent taking of a risk that the bank involved would later become civilly liable to Western Alistar for their (not the bank's) loss.

The statute involved is not one which prohibits making a false statement to a bank, but which prohibits and penalizes executing a scheme to defraud the bank. This Court has held a specific intent to defraud a federal bank is an element of the crime and here the government relied only on the fact that defendant's (alleged) fraud put the bank at risk of being held civilly liable to the person actually defrauded, one of the bank's depositors, Western Alistar, Inc. Since the question appears to be open (as the government conceded below), *this* conviction should be reversed for three reasons: (1) the facts alleged and proven here, i.e., negotiating a check payable to someone else does not constitute bank fraud as it is defined in the plain language of 18 U.S.C. §1344; (2) to the extent the government has raised an ambiguity in that language, related to the involved bank's civil liability "risk of loss," the rule of lenity requires that such ambiguity be resolved in favor of the stricter reading which favors the criminally accused.

REASONS FOR GRANTING THE WRIT

1. **Title 18 U.S.C. §1344 should not be applied expansively to make every ordinary state fraud crime federal bank fraud merely because it involves making a false statement to a bank or because the bank is unintentionally placed at a risk of loss.**

This Court has not determined whether 18 U.S.C. §1344 reaches the deposit of a check in a bank which results in the bank releasing the funds to a party other than the payee. In other words, the question presented is: **Does the mere risk that the bank will suffer a loss resulting from conduct which intends to fraudulently deprive someone else of money satisfy the specific intent element of bank fraud prohibited by sec. 1344?**

Petitioner urges this Court to grant certiorari to answer the question in the negative, thus limiting the interpretation of Section 1344 to cases in which a federal bank is the intended victim of fraud, rather than cases such as this one, where the bank was lied to with the intent to defraud a non-bank third party, which is a garden variety fraud that could as easily be prosecuted under state fraud law.

The Government argued in its pre-trial memorandum (sometimes hereafter referred to as "Mem.") that the district court *should* adopt an interpretation of Section 1344 that would make defendant liable for bank fraud even though what he really did was defraud Western Alistar, Inc. and incidentally, expose National City Bank to a "risk of loss" based on its potential civil liability to Western Alistar, Inc.

Prior to this case, "the Ninth Circuit has never adopted the 'risk of loss' analysis in bank fraud cases." *United States* v. *Wolfswinkel*, 44 F.3d 782 (9th Cir. 1995).

The government's theory based on this "risk of loss" analysis is unlike any other basis for criminal liability in the federal law. According to the memorandum of the United States Attorney[5] filed below on March 12, 1997, this theory is based on the fact that the bank may be exposed to "risk of loss through civil liability."

Such a theory of criminal law is odd indeed.

Defendant submits that it is not at all clear that this is a correct or sound basis for finding criminal liability under the statute, which prohibits the defrauding of the bank.[6]

(a) The plain language of 18 U.S.C. §1344 requires that the government prove a specific intent to defraud the federal bank, not just an intent to defraud someone, with the incidental risk that a federal bank may become civilly liable for some or all of that loss

It appears to be evident that where, as here, a "scheme" is charged and the object or goal of that scheme is defined as "to defraud a financial institution" the Congress intended to criminalize schemes which target banks, not which risked incidental civil liability to banks, while targeting an entirely

---

[5] And it appears this is accurate.

[6] The part of this Section (18 U.S.C. §1344) charged in the Indictment reads:

> "Whoever knowingly executes, or attempts to execute a scheme or artifice - (1) to defraud a financial institution * * * shall be fined . . . or imprisoned . . . or both."

other class of victim. The plain meaning of the language of the statute supports this view.

Indeed, this "risk of loss" theory, based as it is on the potential that a bank will find itself civilly liable to the true victim (i.e., the payee of the check), is akin to holding a defendant guilty of income tax evasion because he deprived a person of income on which they are liable to pay taxes.

The crime is not defined by Congress as a scheme to defraud "any person under circumstance where a financial institution may become liable." Rather it is defined as a scheme to defraud the financial institution. Clearly, the crime charged (and proven) in this case was not a scheme to defraud the bank. The bank's civil liability, like the civil liability of the defendant, was merely an unintended consequence of it.[7]

In its above mentioned pre-trial memorandum, the Government cited *United States* v. *Young*, 952 F.2d 1252, 1256 (10th Cir. 1991); *United States* v. *Briggs*, 965 F.2d 10, 12 (5th Cir. 1992); *United States* v. *Morgenstern*, 933 F.2d 1108, 1114 (2d Cir. 1991), *United States* v. *Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992).[8]

---

[7] Defendant's argument here assumes without conceding that the factual allegations of the Indictment are true because the verdict compels that assumption. At all times defendant has maintained that he is factually innocent of the crimes of conviction, no matter who is viewed as the victim.

[8] The other authorities cited by the Government below merely show that banks can become liable for negligently paying funds to the wrong payee on a check. Here there can be no question that the bank's negligence was the basis of their liability. They were presented with nothing to show that at the time the check in the amount of $78,000.00 was made, defendant was an authorized payee. Rather, the bank itself required that defendant take out a subsequent "dba" and rename his account in the name of that dba in order to negotiate the check. Had the bank acted in a non-negligent

In *United States* v. *Morgenstern*, 993 F.2d 1108, 1114 (2d Cir.), *cert. denied*, 502 U.S. 1101, 112 S.Ct. 1188, 117 L.Ed.2d 430 (1992) and *United States* v. *Barakett*, 994 F.2d 1107, 1110-1101 (5th Cir.), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 701, 126 L.Ed.2d 668 (1994) the Second and Fifth Circuits upheld bank fraud convictions under 18 U.S.C. Section 1344 where the "fraudulent scheme was directed at checking account customers of bank but fraud victimized bank as well" [*Barakett*] and where "direct object of the fraud was to steal from third parties with deposits at the defrauded bank." (See *United States* v. *Holly*, 23 F.3d 902, 909 (5th Cir. 1994).

The three circuits represented in the cases cited by the Government each recognize a "risk of loss" analysis, as the Government claims. In *United States* v. *Young*, *supra*, according to the Government, [Mem., p. 6, lns. 16-18] the Court found there was "an attempt to deceive the bank so that the defendant could have access to *the bank's money*. . .". But here the money the defendant wanted to have access to was the money in the account of the maker of the check, payable to Western Alistar, Inc. The bank named in the Indictment in this case was never the owner of money.[9]

---

manner, it would not have been liable here, and the money would never have been paid to defendant. Instead both the bank and defendant would have discovered that Western Alistar, Inc., the payee on the check, was another account holder at the same branch of the same bank involved here. The bank undertook, on its own, to reimburse Western Alistar, Inc.

[9] As noted above, the Indictment alleged a scheme to defraud National City Bank, and to obtain money and funds "owned by" . . . that bank. The money was, of course, under the bank's control only after defendant deposited the check in his account at the bank, and funds were transferred from the maker's bank to the named victim bank when it honored the check. Two years later the bank discovered its mistake and voluntarily paid the true payee of the check, which also, by serendipity happened to have an account at the same branch of the victim bank as defendant.

Rather, the bank simply honored the check and passed the check onto the bank on which it was drawn. Here the bank's liability came from its civil duty of care to the makers and/or payees of checks it accepts and cashes. Its breach of that duty may have required it to repay the victim, but that did not convert the object of the defendant's "scheme" into a scheme to defraud the bank, rather than the true payee on the check.

According to the Government's memorandum, the district court asked whether the statute applies to the facts of this case, and specifically, whether City National Bank was a bank at risk of loss *within the meaning of the statute*.

The direct and most forthright answer to this question should have been:

> "The term "risk of loss" does not appear in the statute defendant is charged with violating and the Ninth Circuit does not recognize unintended victims who merely happen to be at risk of loss due to civil liability as the equivalent of an intended victim, or as the target of a scheme to defraud."

Indeed, *general*, language found in lower Court decisions supports Appellant's position that the specific intent under section 1344 is an intent *to defraud a bank*. See e.g. *United States* v. *Mason*, 902 F.2d 1434, 1442 (9th Cir. 1990) 442. This is in fairly plain words, precisely what Section 1344, subd. (1) says.[10]

---

[10] This case does not involve subdivision (2) since the indictment did not allege a violation of that subdivision and the government did not prosecute the case on that theory. But the circuit court upheld the conviction in part on the theory that since the bank controlled the money, it was a federal bank fraud. (Please see Appendix, p. 1.)

Since this is the correct answer to the district court's question, applying the plain language of the statute to this case, it is clear the indictment did not charge, and the evidence did not show, the federal crime of executing a scheme to defraud a federal banking institution. Rather it showed, (at most) acts constituting the state crimes of ordinary fraud or a scheme to defraud Western Alistar, Inc.

Here, the plain meaning of those words used in Section 1344 compel the conclusion that intending to defraud Western Alistar, Inc. does not convert the defendant's scheme to bank fraud, merely because it was possible that a federal bank would become civilly liable to Western Alistar for their loss.[11]

(b) Assuming, without conceding ambiguity in 18 U.S.C. §1344 would permit charging and convicting Petitioner of a scheme to defraud a federal bank where, as here, the government theory and evidence was that his scheme was to defraud Western Alistar, Inc. by depositing a check payable to them into his own account at the bank and then withdraw the funds, the rule of lenity would forbid that interpretation.

---

[11] While it has been noted that "the legislative history [of Section 1344] supports a broad construction of the statutory language" *United States* v. *Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992), *United States* v. *Mason*, *supra*, 902 F.2d 1434, 1442, an examination of that legislative history is no substitute for the plain meaning of the words used by Congress in the statute itself, nor for the rule of lenity in the case of ambiguous language in a penal statute.

Any ambiguity in Section 1344 should be governed by the constitutional and basic fairness considerations which underlie the well worn "rule of lenity."[12]

At best, the statute in issue here, Section 1344, appears to be susceptible of at least two interpretations[13]: one, a strict one, that to be guilty the scheme must contemplate or specifically intend victimizing a bank; and the other, a less strict interpretation, that to be guilty there must be a scheme to defraud *someone*, which is indifferent to whether or not a bank ends up being civilly liable for the intended loss, even if the actual intended victim is not a federal bank.

Alternatively, the statute could be read as creating two distinct crimes, one intending to defraud a federal bank of *its* property or money, the other, intending to defraud a federal bank of money or property under its control or in its custody. Either way, the ambiguity should be read in its less expansive form.

Defendant contends the plain meaning of Section 1344 suggests the strict interpretation. Here, as charged, defendant's scheme was not to get the Bank's money, but to get the money belonging to Western Alistar, Inc., the payee of the check.

---

[12] See e.g., *McNally* v. *United States*, 483 U.S. 350 (1987) applying the rule to interpret mail fraud statutes narrowly despite contrary, expansive holdings in unanimous Court of Appeals decisions.

[13] Petitioner makes this argument because the 2d, 5th and 10th Circuits appear to have "interpreted" this meaning into the statute, despite plain language *and* legislative history to the contrary. This argument is not a concession that there really is any such ambiguity requiring "interpretation" by a court, but is made only because some courts appear to have felt such ambiguity was present.

The bank named in the indictment was not even holding their money. Rather, it was merely asked to honor a check drawn on some other bank, which check was payable to Western Alistar, Inc. Under this strict interpretation of the words of Section 1344, the statute was not violated because this was not a scheme to defraud the named bank, nor was it an effort to obtain the money owned by the bank.

Where, as here, a penal statute is susceptible of two different interpretations, one of which included the defendant's conduct and the other of which excludes it, the strict interpretation favoring the defendant must be adopted. This is known as the rule of lenity, and unlike the "risk of loss" analysis, this Court has emphatically endorsed the rule of lenity in similar circumstances. *McNally* v. *United States*, *supra*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292.

This rule requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *Lewis* v. *United States*, 401 U.S. 808, 812 (1971). A statute or rule should not be given an effect that is unfavorable to a defendant unless Congress has "plainly and unmistakably" indicated the result. *Id.* (quoting *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917)).

The rule of lenity "is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981).

Applying the rule to the present case, and giving the authorities from the Second, Fifth and Tenth Circuit due deference, the most that could be said it that the statute is ambiguous, and the rule of lenity should operate to narrow its

interpretation to that of which appellant would have had fair notice. Construing the statute narrowly, in favor of the appellant, his scheme to defraud Western Alistar, Inc. was not bank fraud.

(c) Even considering legislative history, the interpretation urged by the government below would eliminate an element of the crime legislators intended to include — the intent to defraud a federal financial institution.

While the legislative history may have its limits, the Legislative history of Section 1344 (a) in no way justifies reading into that language an intent to create a federal crime where, as here, a federal bank is merely incidentally liable (civilly) to the actual victim of a non-federal scheme to defraud.

Rather, the legislative history of Section 1344 makes it abundantly clear that Congress did not intend the bank fraud statute to cover ordinary state law offenses where, as here, the *intended* fraud victim was not a federally insured bank.

The Senate report regarding this provision states that "[t]he offense of bank fraud in this part is designed to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled or insured." S.Rep. No. 225, 98th Cong., 2nd Sess. 377 (1983), reprinted in 1984 U.S.Code Cong. & Admin.News 3182, 3517 (emphasis added). The House report similarly states that this section is concerned with "fraudulent schemes where banks are victims," H.R.Rep. No. 901, 98th Cong., 2d Sess. 2 (1984), and explains that subsection (a) of Section 1344 "makes it an offense for any person, having devised a scheme or intending to devise a scheme *to defraud a national credit institution or to obtain*

property of such an institution knowingly to engage in conduct in furtherance of the scheme." *Id.* at 6 (emphasis added). The federal interest underlying the legislation is "protecting the financial integrity of these institutions." S.Rep. No. 225 at 377, 1984 U.S.Code Cong. & Admin. News 3517. Where the intended victim is not a bank and the fraud does not threaten the financial integrity of a federally controlled or insured bank, there seems no basis in the legislative history for finding coverage under section 1344(a).

The legislative history suggests that the victimization of banks is the concern of subsection (a) in its entirety, and that subsection (a)(2) is designed to protect against schemes "to obtain property of such an institution. . . ." H.R.Rep. No. 901 at 4, 6. Finally, as this Court recently observed with respect to the federal mail fraud statute, 18 U.S.C. §1341 (1982), (upon which the bank fraud statute was largely modeled), terms connected in the disjunctive need not always be construed independently so that the limits applicable to one term are inapplicable to the second, especially when such a construction would leave the statute's "outer boundaries ambiguous" and involve the federal government in areas more properly left to states and localities. *McNally* v. *United States*, *supra*, 483 U.S. 350, 107 S.Ct. 2875, 2880-81, 97 L.Ed.2d 292.

In considering the proposed bank fraud statute, the House Judiciary Committee was particularly concerned about the case law development of federal jurisdiction under the mail fraud, 18 U.S.C. §1341 (1982), and wire fraud, 18 U.S.C. §1343 (1982), statutes:

> The Committee, however, is concerned by the history of expansive interpretations of that language [i.e., "scheme to defraud" in 18 U.S.C. §§1341 and 1343] by the courts. The current scope of the wire

> and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions. The Committee believes that while the additional activity that could thus be brought within the purview of the language might well be reprehensible, and probably should be criminal, due process and notice argue for prohibiting such conduct explicitly, rather than through court expansion of coverage. H.R.Rep. No. 901 at 4.

It would seem odd indeed if the same committee that expressed concern about judicial expansion of coverage under the wire and mail fraud statutes intended a similar fate for the bank fraud statute it was proposing.

Finally, expansion of the coverage of section 1344 to include conduct that does not intentionally victimize federally insured banks and that is already criminal under state law would also implicate concerns of federalism. This Court has observed, for example, that expansive application of the Travel Act, 18 U.S.C. §1952 (1982), to activity "traditionally subject to state regulation" and to defendants who themselves did not travel interstate (but whose betting customers did) "would alter sensitive federal-state relationships" and "could overextend limited federal police resources." *Lewis* v. *United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). See *United States* v. *Archer*, 486 F.2d 670, 680 (2d Cir.1973). See generally R.J. Miner, Federal Courts, Federal Crimes, and Federalism, 10 Harv.J.L. & Pub.Pol'y 117, 124-27 (1987). (Cf. this Court's dim view of judicial expansion of the mail fraud statute, 18 U.S.C. §1341 (1982), expressing similar concerns. *McNally* v. *United States*,

supra, 483 U.S. 350, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292.)

In sum, neither the language of section 1344, the attendant legislative history, nor the pertinent judicial precedents warrant the application of that statute to the facts of this case.

CONCLUSION

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the circuit court affirming petitioner's conviction.

WHEREFORE, Petitioner prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

Respectfully submitted this 5th day of February, 1999.

WILLIAM J. KOPENY
WILLIAM J. KOPENY & ASSOCIATES, INC.
8001 IRVINE CENTER DRIVE, SUITE 1170
IRVINE, CALIFORNIA 92618-2933
TELEPHONE: (949) 453-2243
FAX: (949) 453-1516

Counsel of Record for Petitioner
Leon Patillo

APPENDIX

Filed October 8, 1998
NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	) No. 97-50513
Plaintiff - Appellee,	)
	) D.C. CR-97-00167-SVW-1
v.	)
	)
LEON PATILLO,	) MEMORANDUM*
	)
Defendant - Appellant.	)

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted September 18, 1998
Pasadena, California

Before: BROWNING, PREGERSON, and HAWKINS, Circuit Judges.

Defendant, Leon N. Patillo, ("Patillo") appeals his conviction of two counts of bank fraud in violation of 18

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

U.S.C. § 1344 in connection with his unauthorized deposit into his City National Bank account of a $78,000 check made out to Western Alistar, Inc. We affirm.

Under 18 U.S.C. §1344, to prove bank fraud, the government must show that the defendant "knowingly execute[d] . . . a scheme . . . to obtain any of the moneys [or] funds . . . under the custody of control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises. Here, the government introduced substantial evidence that Patillo executed a scheme that involved misrepresenting to City National Bank his authority to deposit checks made out to Western Alistar. Although the bank was not the only target of Patillo's fraudulent scheme, it was clearly more than "incidental." Thus, there was sufficient evidence adduced at the trial below from which the trier of fact could reasonably conclude that the defendant, Patillo, intended to deceive City National Bank and that is sufficient for the purposes of 18 U.S.C. §1344.

AFFIRMED

Filed December 18, 1998
NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	) No. 97-50513
Plaintiff - Appellee,	)
	) D.C. CR-97-00167-SVW-1
v.	) (Central California)
	)
LEON PATILLO,	) ORDER
	)
Defendant - Appellant.	)

Before: BROWNING, PREGERSON, and HAWKINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.